UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

CHEF SOLUTIONS, INC.

Employer

and **13-RC-21411**

UNITE HERE LOCAL 450

Union

and

PRODUCTION AND MAINTENANCE UNION, LOCAL 101

Party In Interest

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing on this petition was held on November 10, 2005 on before a hearing officer of the National Labor Relations Board, herein referred to as the Board, to determine whether it is appropriate to conduct an election in light of the issues raised by the parties.[1]

I. Issues

UNITE HERE Local 450 (herein the "Petitioner"), seeks to represent a production and maintenance bargaining unit at the Employer's facility located in Wheeling, Illinois. At the hearing, the parties agreed that should the petition be processed, the bargaining unit should be the same as delineated in the contested collective-bargaining agreement (herein the "Unit"). The Employer is engaged in the business of manufacturing prepared salads at its facility. The Unit consists of approximately 120 employees.

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[1] Upon the entire record in this proceeding, the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
c. The labor organization involved claims to represent certain employees of the Employer.
d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

As a threshold procedural matter, the Employer contends that the Regional Director should hold the instant matter in abeyance and decline to issue a decision based on the Employer's pending federal court lawsuit against Local 101 for contract repudiation[2]. Aside from its procedural argument, the Employer also contends that it has a valid collective-bargaining agreement with Party In Interest Production and Maintenance Union, Local 101 (herein "Local 101") which should serve as a contract bar to the instant petition. Therefore, based on the contract bar principle under Board law, the Employer asserts that, if the Regional Director issues a decision, the petition must be dismissed.

The Petitioner and Local 101 assert that because the instant matter involves a question concerning representation and not a question of contract interpretation, the Employer's federal lawsuit concerning an alleged breach of contract should not prevent the Regional Director from issuing a decision at this time. The Petitioner and Local 101 further assert that Local 101 validly disclaimed interest in representing the Unit. Thus, the Petitioner and Local 101 contend that there is no contract bar to the instant petition and that an election should be directed.

II. Decision

For the reasons discussed in detail below, I find that, because there is a question concerning representation before me in the instant case, I decline to hold the matter in abeyance while the Employer pursues its contract repudiation claim in federal court. I further find that Local 101 validly disclaimed interest in representing the Unit and that the collective-bargaining agreement between the Employer and Local 101 and does not serve as a bar to the instant petition.

Accordingly, IT IS HEREBY ORDERED that an election be conducted under the direction of the Regional Director for Region 13 in the following bargaining unit:

> All full time employees in the classifications covered in the collective-bargaining agreement: boxmaker, packer, general labor, cooker, machine operator, material handler, mixer operator, packer operator, sanitation, sanitation "B," lead cooker, lead machine operator, lead mixer operator, lead sanitation, lead receiving/lead person, forklift operator, order picker, and senior lead employed by the Employer at its facility currently located at 120 West Palatine Road in Wheeling, Illinois; but excluding all clerical employees and guards, professional employees and supervisors as defined in the Act.

III. Background

Initially, the Employer and Local 101 were parties to a collective-bargaining agreement that expired on February 16, 2005. While the Employer and Local 101 were negotiating a successor contract, the Petitioner filed a petition for the same Unit in Case 13-RC-21322. On April 22, 2005[3], the Regional Director issued a Decision and Order in that case dismissing the

[2] On October 25, 2005, the Employer filed Case No. 05-C-6146 against Local 101 pursuant to Section 301(a) of the Labor Management Relations Act.

[3] All dates refer to events in 2005 unless otherwise noted.

Petitioner's petition, finding that the Employer and Local 101 reached a valid collective-bargaining agreement prior to the Petitioner filing its petition which acted as a contract bar to the petition.[4]

On May 5, one of the Employer's employees filed a deauthorization petition in Case 13-UD-484 to withdraw the authority of Local 101 and the Employer to maintain a union security clause in the collective bargaining agreement requiring employees to pay union dues as a condition of employment. An election was held by the National Labor Relations Board on June 22, and on July 11, the Regional Director issued a Certification of Results of Election withdrawing the authority of Local 101 to require Unit employees to pay union dues.[5]

On October 17, Local 101 sent letters to the Employer and the Regional Director disclaiming interest in the Unit. The Employer responded to this disclaimer by filing the federal court lawsuit described above on October 25. The Petitioner filed the instant petition for the disclaimed Unit on October 27.

IV. Facts and Analysis

As an initial matter, it is clear that representational issues, including questions concerning representation, fall within the Board's primary jurisdiction. The courts refuse to exercise jurisdiction over claims touching on representational issues because of the superior expertise of the Board and the incompatibility of the "orderly function of the process of judicial review" with initial district court consideration of representational issues. *Hope Electrical Corporation*, 339 NLRB (2003).

In the instant case, there is clearly a question concerning representation. Though the Employer has characterized Local 101's disclaimer of interest as a repudiation or anticipatory breach of contract for purposes of its Section 301 lawsuit in federal district court, the record evidence in this case shows that the disclaimer was prompted by a deauthorization election filed with and conducted by the Board. Whatever contract issues may or may not exist, there certainly are representational issues that must be resolved with the expertise of the Board -- i.e. whether Local 101's disclaimer was valid, whether the Petitioner's petition should be processed. Moreover, to hold my decision in abeyance during the federal litigation would wrongly foreclose employee free choice. Board law dictates that employee free choice in representation matters is of paramount importance. *Aljud Licensed Home Care Services*, 345 NLRB No. 88 (2005); *Vanguard Fire & Supply Co.*, 345 NLRB No. 77 (2005).

Since there is a question concerning representation and because employee free choice in a representation matter is at stake, I will not hold my decision in abeyance during the pendency of the federal court litigation (which I note was filed only two days prior to the petition in this

[4] In Case 13-RC-21322, the Regional Director found that the Employer and Local 101 had reached a complete successor agreement on March 23, 2005, 5 days before the Petitioner filed its petition. The Regional Director noted that the failure of the parties to actually sign the final draft of the successor contract before the Petitioner filed its petition was immaterial. The Petitioner filed a Request for Review on May 6, 2005, which was denied by the Board on May 18, 2005.

[5] The results of the June 22, 2005 election in 13-UD-484 were as follows: Out of 161 eligible voters, 122 voted to deauthorize Local 101 and 4 voted against the proposition.

case). I find that I have primary jurisdiction to hear and decide the representational issues in this matter. Therefore, I turn to the substantive issue of whether Local 101's disclaimer was valid and whether there is a contract bar to the instant petition.

It is well settled Board law that a contract does not bar an election when the contracting union has validly disclaimed interest in representing the employees covered by the agreement. To be effective, a disclaimer must be clear and unequivocal and made in good faith. *VFL Technology Corporation*, 332 NLRB 1443 (2000); *American Sunroof*, 243 NLRB 1128 (1979). The Board, with approval from the courts, has additionally found that, absent collusion between the parties -- i.e. two or more unions, or a union and employees -- to avoid the terms of a collective-bargaining agreement, a union's disclaimer in representing the unit will be effective. *Id*.; see also *NLRB v. Circle A&W Products Co*., 647 F.2d 924 (9th Cir. 1981). Only when certain factors are present, such as employee forum shopping or inconsistent actions by the disclaiming union, will the Board find the disclaimer to be ineffective. In *East Manufacturing Corporation*, 242 NLRB 5 (1979), the Board found that the union's disclaimer was invalid and that its collective-bargaining agreement with the employer served as a contract bar to a petition filed by another union. Under the particular facts of that case, the Board found that there was collusion by the contracting union and the employees in that the union was an in-house union composed of and solely represented by employees. The Board emphasized that these employees, "who hold the fate of their organization in their own hands, cannot be permitted, absent defunctness, to simply disclaim interest in themselves and select a new labor organization as bargaining representative perhaps in an attempt to secure higher wages and benefits than are set forth in their current contract." *Id.* at 6, fn. 6.

In examining the October 17 disclaimer by Local 101 in this matter, the record shows no evidence of collusion between the Petitioner and Local 101 or of forum shopping among the Employer's employees. To the contrary, all the record evidence establishes that Local 101's disclaimer was clear, unequivocal and proffered in good faith. Louis Burton, Vice President of Local 101, testified that Local 101 decided to disclaim interest in the Unit for two reasons: (1) Local 101 was not receiving enough dues from Unit members; and (2) such an overwhelming number of Unit employees had voted to deauthorize Local 101 in the June 2005 election. Burton testified that of the approximately 120 Unit members, only 13 or 14 were still paying dues in August and September. Burton was repeatedly questioned about what role the Petitioner might have played in Local 101's decision to disclaim interest in the Unit, and he repeatedly testified that the Petitioner played no role at all in this decision. Burton testified that he never discussed Local 101's intention to disclaim with any agents, officers or representatives of the Petitioner.

Likewise, Michael Somone, Organizer for the Petitioner, testified that neither he nor anyone else from the Petitioner was ever informed by Local 101 of its intention to disclaim interest in the Unit. Furthermore, Somone testified that he never had any contact of any kind with anyone from Local 101 since the time of the April pre-election hearing in the above-mentioned Case 13-RC-21322. Regarding contact with the Employer's employees, Somone testified that employees of the Employer came to the Petitioner's office on or around October 20, stating that "Local 101 was finished representing the people" and asking for the Petitioner to represent them. Somone further testified that the Petitioner did not maintain any contacts with the Employer's employees from the time the Petitioner filed its petition in Case 13-RC-21322 in

March until those employees showed up at Petitioner's office on or around October 20. Somone testified that he did not officially learn that Local 101 had disclaimed interest in the Unit until around October 24 or 25.

Burton testified, and the October 17 letter to the Employer shows, that Local 101 requested its written disclaimer be posted on the Local 101 bulletin board for employee viewing. Burton also testified that the President of Local 101 arranged to hold a meeting for the Unit employees at the Employer's premises on Saturday, October 15 to inform them of Local 101's decision to disclaim interest.[6] In addition, Burton testified that, on or shortly after October 17, he and other Local 101 officials received phone calls from Unit members asking if it was true that Local 101 had disclaimed interest in the Unit? Burton testified that he and Local 101 Secretary Charles Campos told the employees that it was indeed true.

Here, as in *VFL Technology Corporation* and *American Sunroof*, supra, the evidence does not establish that Local 101's disclaimer arose from a collusive agreement between Local 101 and the Petitioner and/or between the Petitioner and the Employer's employees, or from any other improper motive. Though the Employer claims collusion in this matter[7], "[t]here is no indication…that the disclaimer was a tactical maneuver, a sham, or made in bad faith." *VFL Technology Corporation, supra*. The Employer presented no witnesses to establish, or even to suggest, that there was collusion between Local 101 and the Petitioner or between the Petitioner and the Employer's employees. All of the record testimony establishes that Local 101 never discussed its intention to disclaim interest with anyone until October. Further, it is undisputed that Local 101 is not an in-house labor organization and the record was devoid of any evidence suggesting that employees were union shopping for a "better deal," as they were in *East Manufacturing*, supra. Unlike the facts in *East Manufacturing*, there is no record evidence that the Employer's employees had any input into Local 101's decision to disclaimer interest in the Unit.

Local 101's October 17 disclaimer was clear and unequivocal, renouncing any intention to act as the employees' bargaining representative, and Local 101 pledged to return to employees any union dues received as of the date of the disclaimer. Moreover,

[6] It must be noted that Somone did not attend this meeting and could not substantiate what was actually discussed at said meeting.

[7] The Employer's arguments addressed herein are those that were made on the record. The Employer's brief was untimely filed in this matter and therefore not considered. I note that briefs from the parties were due on November 17, 2005, seven days from the close of the hearing. The Employer deposited its brief with FedEx on November 17, 2005. Tracking information from FedEx show that the FedEx was given the package data at 3:49 p.m. on November 17, 2005 and picked up the brief for delivery at 7:01 p.m. on that date with expected delivery estimated at to be at 10:30 a.m. on November 18, 2005. The tracking data indicates that there was a "delivery exception . . . incorrect address", at 9: 22 a.m. on November 18, 2005. The Employer's brief was subsequently delivered by hand at 4:55 p.m. on November 18, 2005. Pursuant to the Board's Rules and Regulations, series 8, as amended, Section 102.111(b) to be timely filed briefs must be received by the appropriate office on the due date or be postmarked on the day before the due date. The rule specifically states that documents postmarked on the due date are untimely. See, *Metropolitan Regional Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America (R.M. Shoemaker Co.),* 332 NLRB 1340 (2000).

Local 101 has not taken any actions inconsistent with its disclaimer[8]. To the contrary, Burton testified that Local 101 had no objection to the Petitioner's petition and would not intervene in the election should an election be ordered. In addition, there is some record evidence that even the Employer has complied with Local 101's disclaimer. Burton testified that the Employer has stopped remitting dues for the 13-14 employees who still permit dues to be deducted from their paychecks. Burton testified that the last check Local 101 received from the Employer was in August.

It is well-settled that the Board cannot compel a union to represent employees that it no longer desires to represent. *VFL Technology Corporation*, *supra*; *Electrical Workers Local 58*, 234 NLRB 633 (1978). In giving effect to Local 101's disclaimer, I am giving full expression to the Board's dual purposes of fostering labor relations stability and employee freedom of choice. *Id*.

Accordingly, I direct an election in the unit of approximately 120 employees stipulated to herein.

V. Direction of Election

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by UNITE HERE Local 450.

VI. Notices of Election

Please be advised that the Board has adopted a rule requiring election notices to be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

[8] In *East Manufacturing*, supra, the Board also relied in part on the fact that the in-house union at issue took post-disclaimer actions in that it participated in an arbitration proceeding.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to 12:01a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VII. List of Voters

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). The Regional Director shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 13's Office, 209 South LaSalle Street, 9th Floor, Chicago, Illinois 60604, on or before November 28, 2005**.** No extension of time to file this list will be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VIII. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW, Washington, DC 20005-3419. This request must be received by the Board in Washington by **December 5, 2005.**

DATED at Chicago, Illinois this 21st day of November 2005.

Regional Director
National Labor Relations Board
Region 13
209 South LaSalle Street, 9th Floor
Chicago, Illinois 60604

CATS — Bar To Election – Contract; Procedural Issues

Blue Book 332-0100; 332-5012; 5060-3300

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